SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 662

ROSE KIMEN, PETITIONER,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO

ON WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FEBRUARY TERM, A. D. 1934.

ROSE KIMEN

Defendant in Error,

vs.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO,
a Corporation,

Plaintiff in Error.

TRANSCRIPT OF RECORD.

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1 PLACITA.

3 Praecipe, filed August 19, 1930.

5 Summons issued August 19, 1930.

7 Declaration filed September 5, 1930, contains the common counts and the following special count:

8 "For That Whereas, Also, the defendant, Atlas Exchange National Bank of Chicago, a corporation, on to-wit: November 2, 1929, at Chicago, Illinois, offered to sell to this plaintiff Rose Kimen, four thousand ($4,000) dollars First National Company Collateral

Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of one thousand ($1,000) dollars each, and then and there promised that if this plaintiff purchased said bonds and paid therefor the sum of four thousand ($4,000) dollars, together with the accrued interest thereon, it, the defendant, would repurchase from the plaintiff the said bonds at maturity paying therefor par value of the bonds and accrued interest thereon; and the plaintiff, in consideration thereof did, on, to-wit: November 2, 1929, pay to the said defendant the sum of to-wit: four thousand ($4,000) dollars, and purchased from the defendant the said bonds, and in evidence of the promise and agreement entered into by the plaintiff and the defendant, the said defendant reduced its said agreement into writing, and as an inducement to the plaintiff to purchase said bonds from the said defendant, and as a further consideration thereof, the said defendant delivered to the plaintiff in writing its promise to re-purchase the said bonds as aforesaid, which agreement is in words and figures as follows, to-wit:

Daniel M. Healy, President,
Daniel J. Healy,
Vice-Pres.
J. H. Jones, Vice-Pres.
M. F. Schiavone,
Vice-Pres.
P. Malakates, Vice-Pres.
E. M. Blankenheim,
Cashier.
E. J. Nordholm, Asst.
Cashier.

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO

Capital and surplus $240,000
Chicago, Ill.

November 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you four thousand ($4,000) dollars, par value First National Company, collateral Trust, First Mortgage, series "O" Real Estate 5½% Gold Bonds in denomination of $1,000 each, numbered 4595-4596-4599 and 4600.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000 and accrued interest.

Yours very truly,

B. M. BLANKENHEIM,
Cashier.

B.M./GD

Member
Federal Reserve System

Chicago Clearing
House Association

That said bonds above mentioned matured on, to-wit, July, 1930, that this plaintiff presented said bonds to the defendant, on, to-wit, July 15, 1930, and demanded that it repurchase the same and pay this plaintiff the sum of four thousand ($4,000) dollars and the accrued interest due on said bonds; that the defendant refused

to repurchase said bonds, and although this plaintiff has made repeated demands subsequent to July 15, 1930, upon the defendant to repurchase the said bonds in accordance with said agreement, yet the defendant, though requested, has not paid the sum of $4,000 and accrued interest, or any part thereof to the plaintiff, but refuses so to do; to the damage of the plaintiff of $5,000 and therefore she brings her suit, etc.

ROSE KIMEN, *Plaintiff*,
By HUME & KENNEDY,
Her Attorneys."

(Reverse Side.)

PLAINTIFF'S AFFIDAVIT OF AMOUNT DUE.

State of Illinois, } ss.
County of Cook. }

THOMAS C. KENNEDY, being first duly sworn, says:

That the demand of the plaintiff in the above entitled cause is for the sum of four thousand two hundred and fifty ($4,250) dollars, due and owing from the defendant to the plaintiff under its written agreement dated November 2, 1929, and that there is due to the plaintiff from the defendant after allowing to it all just credits, deductions and set-offs, four thousand two hundred and fifty ($4,250) dollars.

THOMAS C. KENNEDY.

Subscribed and sworn to before me, this 4th day of September, 1930.

(Seal) KENNETH E. MOBERLEY."

11 Appearance and demand for jury by Elbridge W. Rice, attorney for defendant, Atlas Exchange National Bank.

15 Plea filed September 10, 1930:

And the defendant, by E. W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

ELBRIDGE W. RICE,
Attorney for said Defendant.

State of Illinois, } ss.
County of Cook. }

Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to plaintiff from defendant the sum of four thousand, two hundred fifty dollars ($4,250), or any other sum whatsoever; that said defendant did not enter into any agreement with plaintiff and never authorized or empowered anyone else to enter into the agreement alleged in said declaration or in the affidavit thereto attached.

DANIEL M. HEALY.

Subscribed and sworn to before me this 10th day of September, A. D. 1930.

STEPHEN L. RUFF,
Notary Public.

17 January 21, 1931, notice of placing case on trial calendar filed.

19 Withdrawal of Hume & Kennedy and substitution of Shulman, Shulman & Abrams as attorneys for plaintiff filed July 29, 1931.

21 Order for substitution of attorneys.

23 Notice of motion for leave to file additional plea filed October 15, 1931.

26 Additional plea of defendant filed October 15, 1931:

And for a further plea in this behalf, the defendant, by Elbridge W. Rice, its attorney, comes and defends the wrong and injury, when, etc., and says that it, said defendant, is a national bank, organized under the national banking laws of the United States of America; that neither its charter nor the said law gives to the defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity but requires that the defendant in buying and selling investment securities shall do so without recourse, and that the supposed guaranty or repurchase agreement of the said B. M. Blankenheim, cashier, as set forth in plaintiff's declaration is *ultra vires* and void, and this the defendant is ready to verify: wherefore, it prays judgment, etc.

ELBRIDGE W. RICE,
Attorney for Defendant.

State of Illinois, } ss.
County of Cook. }

Daniel M. Healy, being first duly sworn, deposes and says that he is president of the above named defendant and its duly authorized agent in this behalf; that there is not owing to the plaintiff from defendant the sum of four thousand, two hundred fifty ($4,250) dollars, or any other sum whatsoever; that the supposed agreement set forth in said declaration is not the agreement of said defendant; that the said defendant never authorized or empowered anyone to execute the same; and that the said defendant, Atlas Exchange National Bank of Chicago is a corporation organized under the banking laws of the United States of America; and that under the provisions of said law the said defendant had no power or authority to enter into the said supposed agreement mentioned in plaintiff's declaration, and that such agreement is *ultra vires* and void.

DANIEL M. HEALY.

Subscribed and sworn to before me this 13th day of October, A. D. 1931.

HELEN HUTCHINSON,
Notary Public.

29 Order entered October 15, 1931, granting leave to defendant to file additional plea and amended affidavit of merits.

31 Replication to additional plea filed October 21, 1931.

33 Additional count filed by plaintiff October 26, 1931, as follows:

Defendant, Atlas Exchange National Bank, on to-wit, November 2, 1929, at Chicago, Illinois, offered to sell to plaintiff four thousand ($4,000) dollars First National Company, Collateral Trust, Series "O" First Mortgage Real Estate 5½% Gold Bonds in denomination of one thousand ($1,000) dollars each, and then promsied that if plaintiff purchased said bonds and paid the consideration the defendant would repurchase from the plaintiff such bonds at maturity, paying therefor par value and accrued interest; that plaintiff in consideration thereof and conditional upon the agreement of the defendant to so repurchase did on November 2, pay to the defendant the sum of $4,004.47 and received said securities, and defendant did then and there deliver to plaintiff in writing its promise to repurchase which agreement is set out in the first count, which is hereby adopted and made a part hereof; that said bonds and securities matured on July 15, 1930, and plaintiff presented them to defendant, on to-wit: July 15, 1930, and demanded that
34 it repurchase said bonds, but defendant refused and still refuses and now claims that the agreement is prohibited by the National Banking Act, and that it had no right to execute the same, by reason whereof plaintiff tenders said bonds in open court and demands the return of the consideration paid plus accrued interest thereon from the date of sale, and that it thereupon became the duty of the defendant to repay the same, and although plaintiff has made repeated demands for same, yet the defendant refuses to do so and still refuses, to the damage of the plaintiff of five

thousand ($5,000) dollars, and she therefore brings this suit.

SCHULMAN, SCHULMAN AND ABRAMS,
Attorneys for Plaintiff.

State of Illinois, }
County of Cook. } ss.

Rose Kimen, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above entitled cause, and that the nature of her claim is for moneys had and received by the defendant from the plaintiff, as is more fully set out in the additional count to said declaration, and that there is due her from the defendant after allowing the defendant all its deductions or set-offs the amount of $4,002.47 plus interest at the legal rate from November 2, 1929.

ROSE KIMEN.

Subscribed and sworn to before me this 26th day of October, 1931.

ROSE REITENBERG,
Notary Public.

36 Order entered October 26, 1931, granting leave to plaintiff to file additional count to her declaration.

38 Demurrer filed October 31, 1931, by defendant to plaintiff's additional count.

42 Order entered November 5, 1931, overruling plaintiff's demurrer to defendant's additional plea.

44 Pleas to additional count filed November 14, 1931. First plea general issue, second plea to additional count, that defendant is a national bank organized under the national banking laws of the United States of America; that neither its charter nor the said law

gives to the said defendant any power or authority in selling investment securities to enter into an agreement to repurchase the same at a subsequent date but requires that such securities be sold without recourse, and that the supposed repurchase agreement mentioned in plaintiff's additional count is *ultra vires* and void and this the defendant is ready to verify, etc.

45 Third plea to additional count—that defendant is a national bank organized under the national banking laws of the United States of America, and that the said national banking laws of the United States prohibit banks organized thereunder from selling investment securities unless they be sold without recourse, and that said repurchase agreement mentioned in plaintiff's additional count was in violation of the prohibition contained in said national banking act, and that the only benefit received by this defendant from the execution of said contract was the payment to it of one-half per cent of the face value of said bonds mentioned in said agreement or twenty ($20) dollars, and that this defendant received no other or further benefit therefrom and this the defendant is ready to verify; wherefore it prays judgment, etc.

46 Amended affidavit of merits:

DANIEL M. HEALY, being first duly sworn, deposes and says that he is the president of the above named defendant and is the duly authorized agent in this behalf; that there is not due or owing to the plaintiff from the defendant the sum of four thousand two hundred fifty ($4,250) dollars; that the supposed agreement set forth in the declaration is not the agreement of said defendant, and that the defendant never authorized or empowered anyone to execute the same; that

the defendant is a corporation organized under the banking laws of the United States of America, and that under the provisions of said law said defendant has no power or authority to enter into the said supposed agreement mentioned in plaintiff's declaration, and that such agreement is *ultra vires* and void; that the only benefit received by the defendant on account of said contract is the sum of twenty ($20) dollars paid as the consideration for the excecution of the same.

48 Replications to the second and third pleas to the additional count filed November 25, 1931. Replication to the second plea to additional count states that if plaintiff was prohibited from buying and selling the securities involved and was not authorized by the national banking laws to enter into the agreement mentioned, then it ought to return the money received, together with interest, plaintiff offering to return the securities purchased. Replication to the third plea: Plaintiff says that if she was prohibited by the national banking laws from entering into the agreement then the money ought to be returned to the plaintiff, and that the benefits received by the defendant were not the sum of twenty ($20) dollars, but that it received the entire amount from the defendant as set forth in plaintiff's additional count, and that the defendant ought therefore to return the entire consideration received by it; that plaintiff hereby offers and tenders to return the securities purchased on the alleged illegal agreement, and this the defendant prays may be inquired by the country.

51 A verdict of the jury filed January 8, 1932, as follows:

We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of four thousand four dollars and forty-seven cents ($4,004.47), dollars, plus accrued interest.

53 Motion for new trial, January 8, 1932, by defendant.

55 January 27, 1932, order overruling motion for new trial. Motion in arrest of judgment by defendant. Order overruling motion. Judgment on the verdict against defendant for four thousand four dollars and forty-seven cents ($4,004.47). Exception by the defendant. Order allowing appeal to the defendant to the Appellate Court for the First District, State of Illinois, upon filing appeal bond in the penal sum of five thousand ($5,000) dollars within sixty days, and a bill of exceptions in ninety days.

55-B Motion entered by plaintiff to amend judgment.

57 Order amending judgment, as follows:

This cause coming on again to be heard upon the motion of the plaintiff by Schulman, Schulman and Abrams, her attorneys, for an order of judgment entered in this suit by this court January 27, 1932, for errors apparent upon the face of the record.

And it appearing to the court that notice of the pendency of this motion was duly given to the defendant, and that said defendant appeared in open court by its counsel, and that this matter was continued without further notice to this day, and the court having examined the records, heard the arguments of counsel and being fully advised in the premises, finds that the jury in said suit on to-wit: the 8th day of January,

A. D. 1932, returned its verdict into open court in this cause in the following words and figures, to-wit:

"We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of four thousand four dollars and 47/100 ($4,004.47) plus accrued interest."

That upon the return of said verdict into court the defendant entered herein its motion for a new trial, which said motion for a new trial was heard and denied by the court on to-wit: January 27, 1932, and thereupon said defendant's motion in arrest of judgment was also denied by the court on said date;

Whereupon it was considered by the court that the plaintiff have and recover of the defendant her damages in the sum of $4,004.47 principal, and accrued interest thereon from November 2, 1929, in the manner and form as by said verdict assessed, and the said clerk of said court was then and thereby the presiding judge thereof directed to enter an order of judgment in said suit in manner and form as aforesaid, but that through an inadvertence said clerk entered an order of judgment only in the sum of $4,004.47, the principal amount found to be due by said jury, and not for said principal amount plus accrued and computed interest thereon as directed by the court.

IT IS THEREFORE ORDERED that the said order of judgment aforesaid be and same is hereby vacated and set aside, and plaintiff now in open court remitting the sum of $110 from the interest computed on said ver-
58 dict in the amount of $436 as aforesaid, it is now considered by the court that the plaintiff have and recover of and from the defendant her damages in the sum of $4,004.47 principal plus interest in the sum of

$326, or a total of four thousand three hundred thirty and 47/100 ($4,330.47) dollars, and that she have execution therefor, and that the clerk of this court enter judgment in said suit in manner and form as last aforesaid.

To which order of judgment the defendant enters herein its exception, which is overruled, and the defendant now prays an appeal to the Appellate Court of Illinois for the First District, which appeal is allowed upon said defendant entering into bond in the sum of $5,000, with surety to be approved by the court in 60 days from this date and that said defendant have leave to present and file its bill of exceptions herein within 90 days from this date.

Enter: THOMAS J. LYNCH,

Judge.

Dated at Chicago, this 30th day of January, A. D. 1932.

59 Bill of exceptions and stipulation filed April 6, 1932.

61 Evidence. Trial commenced January 8, 1932, before Judge Thomas J. Lynch. Appearances, Messrs. Schulman, Schulman & Abrams for plaintiff, Elbridge W. Rice for defendant.

62 PLAINTIFF'S EVIDENCE.

LEO AWOTIN, a witness called on behalf of plaintiff, testified as follows:

Direct Examination by Mr. Abrams.

My name is Leo Awotin. I am and have been a physician and surgeon for fifteen years. My office is at 5914 South Francisco. I know the plaintiff, Rose Kimen. I have been at the Atlas Exchange National
63 Bank. I know the president, the cashier, and vice-president. I was present at the Atlas Bank about November 2, 1929. The cashier, Blankenheim, and Rose Kimen were there at that time.

64 We had a conversation on November 1 and November 2. The conversation on November 1 was at the Atlas Exchange National Bank. Rose Kimen and I and cashier Blankenheim were there.

65 Mr. Blankenheim said: "You know, instead of putting the money in a savings account she could buy bonds of the First National Company." He said those bonds will be short time bonds, you know, for a few months; and they are one hundred per cent good; they are out of town bonds. Rose Kimen said, you know, she needed the money, you know; that she couldn't buy bonds; and besides she don't know anything about those bonds, the out of town bonds, that she has not been able to investigate, she is not able to investigate those bonds. Mr. Blankenheim said, "Would you buy those bonds from us if we promise and agree to

repurchase those bonds at maturity, at par and accrued interest?" Now, she says: Well, that is what
66 suited her, you know; and she asked, you know, on what terms the banks sells those bonds. He said, you know, "Well, if you pay us, you know, $98 per hundred, then we agree and promise to repurchase those bonds from you at par value and accrued interest, and then we do not need to go and investigate those bonds. Those bonds will be due and you will get cash from the bank." Well, she said, that will be all right, "but I want you to write me down on a paper this contract what you propose me. Then Mr. Blankenheim said: "Well, then you have to pay one-half per cent more." She said, "I better pay you a half per cent to protect myself." Then she paid 98½ per hundred. That was on November 1.

67 I was at the bank on November 2. There was Mr. Blankenheim, myself and Rose Kimen, there. The document marked for identification Plaintiff's Exhibit 1, was signed in my presence.

68 The cashier, Mr. Blankenheim, at the Atlas Exchange National Bank signed it.

69 The document was delivered to Mrs. Kimen in my presence.

(Document offered and admitted in evidence as Plaintiff's Exhibit 1.)

It is in words and figures as follows:

70

Daniel M. Healy, President.

Daniel J. Healy, Vice-Pres.	P. Malakates, Vice-Pres.
J. H. Jones, Vice Pres.	B. M. Blankenheim, Cashier
M. F. Schiavone, Vice Pres.	E. T. Nordholm, Cashier

ATLAS EXCHANGE NATIONAL BANK
OF CHICAGO

Capital and Surplus $240,000.00
Chicago, Ill.

Nov. 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you Four Thousand ($4,000.00) Dollars, par value First National Company, Collateral Trust, First Mortgage, Series "O" Real Estate 5½% Gold Bonds in denomination of $1,000.00 each, numbered 4595-4596-4599 and 4600.

Should you desire to re-sell these bonds to us, we hereby agree to re-purchase same at maturity at par or $4,000.00 and accrued interest.

Yours very truly,

B. M. BLANKENHEIM,
Cashier.

B.M.B/CD

Member Federal Reserve System. Chicago Clearing House Association.

71 The bonds marked for identification Plaintiff's Exhibits 2, 3, 4 and 5 were delivered to her when she bought those in the bank on November 2, 1929. They were delivered to her in my presence.

(Documents offered and admitted in evidence as Plaintiff's Exhibits 2 to 5, both inclusive.)

73 The said documents are four collateral trust First Mortgage 5½% Gold Bonds, Series "O" of the First National Company, due July 15, 1930, for $1,000.00 each and numbered, respectively, M4595, M4596, M4599 and M4600, each having attached thereto interest coupon No. 3 due July 15, 1930 for $27.50.

80 After these bonds were delivered to Miss Kimen I was at the Atlas Exchange National Bank with Miss Kimen several times. I was present with Rose Kimen at the West Side National Bank, not the Atlas Exchange Bank, but at the West Side National Bank.

81 That is a bank that consolidated with the Atlas Exchange National Bank. I was there July 15, 1930. Mr. Blankenheim, the cashier, was there. Miss Kimen was with me. She said, "Here are the bonds, you know, and I want you to repurchase those bonds." Mr. Blankenheim said, "I can't repurchase those bonds. You will have to see Mr. Healy first about those bonds. Mr. Healy has something to say to you." We afterwards saw Mr. Healy, Mr. Daniel M. Healy.

82 It was about a week after July 15 that we went to see Mr. Healy. We had a conversation with him at that time.

83 Miss Kimen said, "Well, I brought in those bonds to you, you know, to repurchase. Mr. Blankenheim told me to see you about those bonds." Mr. Healy said, "Well, I have no money at the present time to

repurchase them. The bank is merged. As soon as I get the money I will repurchase those bonds from you." He said, "I authorized the cashier to sell you those bonds and make with you a written contract and I am liable for those bonds, but at the present time there is no money on hand." He said to me that the Atlas Exchange National Bank merged with the West
84 Side National Bank. He said that the bank assets are tied up. He said he had about $160,000 in bank assets but the money was tied up and that she has to wait, you know, for a few months.

86 I was there several times with Rose Kimen at the bank. I don't remember exactly the date of the last time, but Mr. Blankenheim told me, you know, that the banks were merged and that the bank's assets are tied up, and the only thing for her to do is to wait.

Cross Examination by Mr. Rice.

I was not present with Rose Kimen before these bonds were purchased by her at the bank. November 1 was the first time I was there.

87 At that time I bought bonds and she bought bonds. She bought $2,000 worth on November 1 and $2,000 worth on November 2. She made two purchases. Mr. Blankenheim, the cashier, talked to me first, you know, about the bonds. Then afterwards he talked to her about bonds. He discussed first the matter with me in her presence, and then he discussed it with her, you know.

88 It isn't true that I first bought the bonds and then she said she wanted bonds on the same terms that I bought them. What did happen was that Mr. Blankenheim, the cashier, proposed to me those bonds. Now,

then, after when he was through with me—with his conversation he turned to Rose Kimen and proposed to her those bonds. He proposed those terms what I mentioned to you. And the conversation with her was an entirely separate one from the one with me. First he proposed the bonds to me.

89 I went to the West Side National Bank on July 15, the date that the bonds became due. I had not been there before the purchase of the bonds. I was there on July 15, 1930, the first time to propose those bonds for sale. After I talked to Mr. Blankenheim on July 15th I saw Mr. Healy about a week after. I saw him in his office right across the street in the Conway Building.

90 Rose Kimen was with me. The three of us were there. It is not true that at that time Mr. Healy told me that Mr. Blankenheim had no right to make the agreement with me. I testified in my own case here. That case was tried before Judge Rush in this court on May 31, 1931.

91 I testified at that trial.

Q. Didn't you at that time testify that Mr. Blankenheim said to you, "If you buy the bonds the price is 98, but if you buy under a written contract the price is 98½?"

Mr. Abrams: Objected to. Whatever this witness testified to at a different trial—

Mr. Rice: I am not through. Wait. I am not through with my question.

Mr. Abrams: All right.

Q. (Continuing.) One-half per cent in excess of the market price in consideration of the written agreement?

Mr. Abrams: Objected to. Whatever this witness testified to in that trial has nothing to do with this case.

The Court: Objection sustained.

Mr. Rice: Exception.

To which action of the court the defendant by its counsel then and there duly excepted.

92 Rose Kimen, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Abrams.

My name is Rose Kimen. My occupation is a housekeeper, for Dr. Leo Awotin, the witness who testified a minute ago. I know Mr. Blankenheim, the cashier of the Atlas Exchange National Bank. I was at the Atlas Exchange National Bank about November 1, 1929.

93 Dr. Leo Awotin was with me. At that time I had a conversation with Mr. Blankenheim. Mr. Blankenheim said he had bonds for sale, First National Company Bonds, and they are 100 per cent good, safe and short term bonds. I told him I don't want to buy the bonds, that I don't know anything about the bonds, how good or how bad they are; and I need the money, and I could not buy the bonds.

Mr. Blankenheim said, "Would you buy the bonds from us if we repurchased them from you at maturity?" I asked what terms he is selling those bonds on. Mr. Blankenheim said, "If you buy those bonds from us now and pay 98 per one hundred down we promise and agree to repurchase those bonds from you at maturity at par value."

And I said, "I want a contract," and I asked Mr. Blankenheim, "would you please write it down?"

94 Mr. Blankenheim said, "If you want us to write down that in a contract you have to pay a half cent more for making the contract." I said, "I will pay the half cent more for you to make the contract"; and I pay 98½ per hundred.

95 And I accepted the contract. Mr. Blankenheim said it would be a half a cent more, and I said, "All right, I will pay the half cent," and altogether I paid $4,004.47.

Mr. Blankenheim said, "Now, you will have nothing to worry about on those bonds. As soon as those bonds are due you get your cash." If he wouldn't promise to give me the cash and wouldn't make the written contract I wouldn't buy the bonds, because I didn't know nothing about those bonds, that is all.

96 Plaintiff's Exhibits 2, 3, 4 and 5 are the bonds that I received at that time. They are exactly the bonds I received from him at that time. I was at the Atlas Exchange National Bank of Chicago, on July 15, 1930, that was at the West Side National Bank. Dr. Leo Awotin was with me. We saw Mr. Blankenheim, the cashier, and had a talk with him.

Mr. Rice: I object to any testimony as to the con-
97 versation with Mr. Blankenheim on July 15, 1930.

The Court: At the present time the objection is overruled.

Mr. Rice: Exception.

I offered him the bonds for sale at that time and he said, "I can't buy your bonds because you will have
98 to see Mr. Healy, the president of the bank. He has something to say about those bonds."

A week or so later I went to see Mr. Healy with Dr. Awotin at 111 West Washington street. I offered him the bonds for sale, and he said that he hasn't any money to purchase those bonds; that as soon as he got the money that he would purchase those bonds, that the banks were merged and that he has no money to buy the bonds but as soon as he gets the money then he will buy the bonds back because he feels—

99 Afterwards I saw officers of the bank, but I didn't talk that matter over with them. I saw them some time but I didn't talk with them. I never received any money on those bonds. Since I first purchased the bonds I have collected the first coupon. I think that was on January 15, 1930.

100 I didn't collect the coupon on July 15, 1930. I am willing to tender these bonds to defendant if they will pay me back the money that I paid.

Mr. Abrams: On behalf of the plaintiff I now tender these bonds in open court if they will pay us back the four thousand and odd dollars we paid for them.

101 Plaintiff rests.

The following instructions and motions were offered by the defendant at the close of plaintiff's evidence:

102 Motion by defendant in writing to give the jury the following instruction:

"The jury are instructed to find the issues for the defendant."

Motion denied.

Exception by defendant.

104 Instruction marked refused.

Exception by defendant.

106 DEFENDANT'S EVIDENCE.

DANIEL M. HEALY, a witness called on behalf of defendant, testified as follows:

Direct Examination by Mr. Rice.

My name is Daniel M. Healy. I live at 3300 Sheridan road. I was president of the Atlas Exchange National Bank of Chicago.

The document which you show me marked Defendant's Exhibit 1 for identification is the charter under which the Atlas Exchange National Bank was organized.

107 The document marked for identification Defendant's Exhibit 2 is additional authorization given to the bank extending the period of its existence. Under the first the period of existence was twenty years. The law was changed to 99 years.

108 Defendant's Exhibit 1 offered and admitted in evidence.

Charter of the Atlas Exchange National Bank dated August 5, 1915, executed by Acting Comptroller of the Currency certifies that the bank is authorized to commence the business of banking as provided in Section 5169 of the Revised Statutes of the United States.

109 Defendant's Exhibit 2 offered and admitted in evidence, dated September 6, 1922, executed by D. R. Crissinger, comptroller of the currency, states that an Act to amend Section 5136 Revised Statutes of the United States, provides that all national banking

associations organized under the laws should have succession until 99 years from July 1, 1922, and certifies that the Atlas Exchange National Bank of Chicago was organized under the laws of the United States on July 1, 1922, and that its corporate existence was extended for 99 years from that date and subject to the conditions and the Act of Congress.

110 (Witness Daniel M. Healy, continuing): Mr. Blankenheim was not employed by the Atlas Exchange National Bank and was not an officer of the bank on July 15, 1930. The bank was out of business. It went out of business on June 21, 1930. Mr. Blankenheim was not at that time (July 15, 1930) connected in any way with the Atlas Exchange National Bank.

111 About a week after July 15, 1930, Rose Kimen and Dr. Awotin were at my office. At that time I did not state to them that I as president of the bank, or otherwise, had authorized the execution of the repurchase agreement which has been offered in evidence as Plaintiff's Exhibit 1. I did not state at that time that I was liable or that the bank was liable upon that contract and that I would pay.

112 At that time the doctor and Mrs. Kimen came in to the office and the doctor said that he had some First National bonds and so did Mrs. Kimen, that they had a repurchase agreement from the Atlas Exchange National Bank, that they had been down to see Mr. Blanhenheim and that he sent them to me. I said I had seen him about it because Mr. Blankenheim had called me up the week previously and said that they had been at the bank. I told them that I could not recognize that agreement because it was against the law.

I said, "Mr. Blankenheim never had any business signing it"; that if I paid the money I would be violating the law and I might become personally liable.

I told the doctor and Mrs. Kimen further that if I had the cash myself I would buy the bonds, but that my money was all tied up in bonds; that if they wanted to make a trade with me for some other bonds I would personally give them my own bonds for these; but that
113 I would absolutely not recognize it on behalf of the bank because I would only get myself into a fix by violating the banking law.

That was substantially the conversation. Dr. Awotin said he thought he would take bonds in exchange for them. He told me to send him a list so he could go out and look at the properties. I told him I would and about two days afterwards I made out a list. Then he sent me word that he did not want to go through with the deal on the exchange and I dropped it.

Q. Mr. Healy, do you know what the market value of these bonds was on the date of November 2, 1929?

Mr. Abrams: That is objected to.

The Court: What is your objection?

Mr. Abrams: What difference does it make what their market value was?

The Court: Objection sustained.

Mr. Rice: Exception.

To which ruling of the court the defendant by its counsel then and there duly excepted.

114 *Cross Examination by Mr. Abrams.*

I was and still am the President of the Atlas Exchange National Bank. The Atlas Exchange National Bank was not closed by the State Auditor. It is not still open. On July 15, 1930, the Atlas Exchange National Bank was not doing business. The Atlas Exchange National Bank was sold to the West Side National Bank.

115 When the bank was closed the West Side National Bank took over all the deposit liabilities. There were no trusts. There was a written agreement for the taking over of the bank. It is not a fact that the Atlas Exchange National Bank merged with the West Side National Bank, nor did they consolidate. We turned over the assets on their assumption of the deposit liabilities.

116 I never was President of the West Side National Bank, nor Vice-President. I never held an office or directorship, and never had anything to do with the West Side National Bank.

Mr. Litsinger, my partner, was the attorney for the bank. Mr. Blankenheim was cashier of the Atlas Exchange National Bank until the time it was taken over by the West Side National Bank, up to June 21, 1930. When it was taken over Mr. Blankenheim was made Assistant Cashier of the West Side National Bank.

If people had any dealings with the Atlas Exchange National Bank today and had to see the cashier I don't know who they would see. They did not have any cashier there.

117 When the bank went over to the West Side I had the resignations of all the officers.

I did not give the resignations to the Auditor of Public Accounts. He had nothing to do with that. This is a national bank.

I did not give them to the Comptroller. I am the liquidator of the bank. I have the resignations in my vault.

If anyone wanted to see Mr. Blankenheim they could find him at the West Side National Bank, but they could not find the cashier of the Atlas Exchange National Bank.

118 If anyone wanted to see the cashier of the Atlas Exchange National Bank in July, 1930, you mean? We had no cashier.

The Comptroller did not close the bank. We sold the bank out. The bank was never closed as you would close a bank. I sold it at 100 cents on the dollar.

There were minutes of the meeting where the resignation of Blankenheim, the cashier, was accepted. They should have been spread on the records.

119 I have not looked at the records lately, but my impression is that we did draw up minutes. I have the minutes in my office. I last saw them about a year ago.

My resignation as President is not there. I am the liquidator handling the whole thing and my resignation was not handed in.

121 I will not produce the minutes of the West Side National Bank and the Atlas Exchange National Bank at the time of the taking over of the bank unless I am ordered to. I have nothing to do with the West Side National.

In the course of being President of the Atlas Exchange National Bank I did not know that the bank had sold bonds with an agreement to repurchase same.

122 I never knew this until after Mr. Awotin went to Mr. Blankenheim and demanded payment, after the bank had been sold. I had no active management of the bank.

I used to go over about once a month.

Mr. Blankenheim was the active man in the bank.

There are not any claims against the bank for similar contracts. Mr. Awotin and this lady are the only two having such claims.

When I ascertained the existence of this agreement I did not offer to turn back any money. I did not offer as an officer of the bank to return any money.

123 I am not willing now to return the money. I have no right to return it.

When Mr. Awotin and Mrs. Kimen came to see me I knew that the bank was not liable on that agreement. I told them if they were not satisfied with the bonds I would take them back and give them some of mine. I thought that the bonds were good. I thought on July 15, 1930, the bonds were good. I have got money on mine since.

124 I knew on July 15th that the bonds were in default, but I still thought they were good.

Re-direct Examination by Mr. Rice.

I am willing to give her back the $20 that was received for the execution of this agreement.

126 Defendant rests.

127 EVIDENCE IN REBUTTAL FOR PLAINTIFF.

DANIEL M. HEALY, a witness called on behalf of plaintiff:

Direct Examination by Mr. Abrams.

129 Since testifying here I have received a subpoena to produce certain documents. I have neither of the documents mentioned in the subpoena, Documents Numbers 10692657 and 10692658.

131 I have the minutes of the Atlas Exchange National Bank.

I am looking at the document marked "Assignment" on page 203. It is the turning over of title to the bank of the other building.

132 I don't remember whether it was prepared by me or not.

133 It was prepared in my office.

I don't know whether a copy of it was filed in the office of the Recorder of Cook County because we turned it over to the bank.

134 I signed the original of that document. I don't know where the original is. The copy in this book is a true and correct copy of the original.

I have not had the original since the day the other bank took it. We sold it; and they took it.

This book that I hold is a true and correct minute book of the Atlas Exchange National Bank.

135 And everything contained therein is true and correct.

Mr. Abrams: I offer that page in evidence as Plaintiff's Exhibit 6.

Mr. Rice: If the court please, this resolution merely purports to authorize certain officers to make a conveyance of certain real estate from the Atlas Exchange National Bank to the West Side National Bank. It is not in any way material to the issues in this case.

The Court: It says they merged. I think I will permit it to be received in evidence.

Mr. Rice: Exception.

136 Said document offered and received in evidence as Plaintiff's Exhibit 6.

137 ASSIGNMENT.

WHEREAS, by proper vote of the Board of Directors and stockholders of the undersigned, The Atlas Exchange National Bank of Chicago, the said bank is being merged with The West Side National Bank of Chicago, and is conveying all of its assets to said The West Side National Bank of Chicago, and

WHEREAS, the undersigned is entitled to and is collecting rents from a certain portion of the premises located at 915-917-919 and 925 S. Halsted Street, also 772 W. Taylor Street, Chicago, and

WHEREAS, it is desired to assign to said The West Side National Bank of Chicago, all of the right, title and interest of the undersigned in and to said rentals,

NOW THEREFORE, IN CONSIDERATION OF THE FOREGOING and in consideration of the sum of ten (10) dollars paid to the undersigned by The West Side National Bank of Chicago, receipt whereof is hereby acknowledged, the undersigned, The Atlas Exchange National Bank of Chicago, does hereby sell, assign,

transfer and set over unto said The West Side National Bank of Chicago, all of its right, title and interest in all of the rentals being collected by the undersigned from the premises known and described as follows:

Lots One (1), Two (2), three (3), and four (4) in the County Clerk's Division of Lots one (1), Six (6), seven (7), twelve (12), thirteen (13), eighteen (18), nineteen (19) and twenty-four (24), in Block Ten (10) in the School Section Addition to Chicago, in Cook County, Illinois.

The undersigned also authorizes and empowers the said The West Side National Bank of Chicago to collect said rentals in its own name or in its name as assignee, of the undersigned, and authorizes said assignee to take any steps necessary including legal procedure to enforce payment of said rentals and to collect the same pursuant to the terms of this agreement.

IN WITNESS WHEREOF, the undersigned, THE ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, has caused this assignment to be executed in its name by its President thereunto duly authorized and its corporate seal to be affixed, duly attested by its cashier, this ..... day of June, 1930.

THE ATLAS EXCHANGE NATIONAL BANK OF CHICAGO.

By .....

President

Attest:

By .....

Secretary.

138 (Witness, Daniel M. Healy, continuing.)

Page 201 of this book is a true and correct record so far as it goes, but it is only part of the whole record.

That is one page of the contract. The whole contract is in there. It is all true and correct. The contract starts right there, on this page (indicating).

139 The first page is 193. The whole transaction is from page 193 to page 201, and is a true and correct copy of the minutes of the entire transaction.

Mr. Abrams: I offer that in evidence as Defendant's Exhibit 7.

Mr. Rice: I object to this for the same reason, that there is nothing here that is material. There is no provision here in this resolution or in the contract authorizing the West Side National Bank to act for the Atlas Exchange National Bank with reference to transactions similar to this. They did not assume those obligations. They did not under this become the successor in any way to the Atlas Exchange National Bank, under any of the provisions here.

144 The Court: I will overrule the objection.

Mr. Rice: Exception.

Which said document was offered and received in evidence as Plaintiff's Exhibit 7.

146 MINUTES of Special Meeting of the Board of Directors of the Atlas Exchange National Bank of Chicago, Chicago, Illinois, held on the 20th day of June, A. D. 1930, in their banking quarters at 925 So. Halsted Street, Chicago, Illinois.

Present:

Daniel M. Healy
T. Frank Quilty
Daniel J. Healy
Peter Malakates
Andrew J. Schultz
Salvatore Ferrara
Salvatore Sisco
B. M. Blankenheim

The Minutes of the previous meeting held on the 19th day of May, 1930, were read and approved.

The President announced that because so many of the customers of the Atlas Exchange National Bank has moved westward, he had opened up negotiations for a merger with the West Side National Bank, at Ashland Avenue and Roosevelt Road, and that a contract has been prepared providing the terms and conditions thereof, which proposed contract is as follows:

THIS AGREEMENT entered into by and between THE WEST SIDE NATIONAL BANK OF CHICAGO, a corporation organized and existing under and by virtue of the laws of the United States, party of the first part, and THE ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, a corporation duly organized and existing under and by virtue of the laws of the United States, party of the second part, WITNESSETH:

WHEREAS, the West Side National Bank has offered to assume and agree to pay the deposit liabilities of the Atlas Exchange National Bank as of June 20, 1930. All charged off assets of the Atlas Exchange National Bank are also to be transferred.

NOW THEREFORE, the parties hereto in consideration of the assumption of such liabilities and of One Dollar each to the other in hand paid, the receipt whereof is hereby acknowledged, agree as follows:

Party of the second part agrees to hold the party of the first part free and harmless from loss on account of the assumption of such liabilities, and in pursuance of such agreement will transfer, assign, and convey to the party of the first part all of its assets, consisting of cash, bonds, securities, notes, choses in action, and real estate, and charged off assets are also included. It is the intention to transfer all assets of any character whatsoever whether shown by the books or not as of June 20, 1920.

Party of the second part agrees to execute its corporate promissory note for Two Hundred Thousand ($200,000.00) Dollars, payable on or before one from date with interest at six (6%) per cent per annum, which note and interest shall be secured by such part of said bonds, securities, notes, choses in action, property and real estate as is described in Schedule "A" hereto attached. It is understood, however, that all assets of any character whatsoever of the party of the second part assigned and conveyed to the party of the first part shall be utilized to the full extent and value to guarantee the party of the first part from any loss of any character due to the assumption of the liabilities aforesaid.

Party of the first part shall at all times have the full right and power of substitution of any assets mentioned in "Schedule A" for any other asset not therein mentioned. For instance if any of the assets not described in "Schedule A" are considered unsatisfactory at any time said party of the first part shall have
147 the right to substitute therefor, assets of like amount which are described in "Schedule A," and party of the first part shall have such power of substitution before any proceeds or credits are applied on said note for Two Hundred Thousand ($200,000.00) Dollars.

Party of the first part shall have the power to compromise or convert into cash any notes that are acquired from party of the second part and a renewal or compromise shall not in any way affect the rights of the party of the first part. At any time that the party of the first part so desires, it may elect to select any asset or assets and give proper credit therefor to the party of the second part.

Any legal or other expenses necessary to liquidate any assets from the Atlas Exchange National Bank shall be charged to the Atlas Exchange National Bank and interest on deposits will be computed and charged against the Atlas Exchange National Bank as of June 20th, 1930.

Party of the second part agrees forthwith to furnish to party of the first part, a bond or guarantee, with surety satisfactory to party of the first part, in form and content of "Schedule B" hereto attached. One year from the date hereof an appraisal will be made of the assets of party of the second part by a person or persons to be selected by the parties hereto, and if they do not agree, then to be selected by the Chief Na-

tional Bank Examiner of the Seventh Federal Reserve District, and at the election of party of the first part it will demand and obtain the payment of the Two Hundred Thousand ($200,000.00) Dollars provided to be paid by said bond or guarantee, or so much of it as said party of the first part shall deem necessary. In case the assets as appraised plus the Two Hundred Thousand ($200,000.00) Dollars proceeds of said bond or guarantee shall be deemed insufficient by party of the first part to make it entirely safe on its assumption of said liabilities, it shall have the right to require an examination of the assets by a National Bank Examiner in order to enforce the individual liability of the stockholders of party of the second part, as provided by the National Bank Act, and nothing in this agreement shall be construed as a waiver of that liability. Such assessment, however, shall not be made in less than eighteen (18) months from the date hereof, and if made, party of the second part shall have the right to purchase all or any part of said assets at the appraised value.

In the event that the surety or sureties, guarantor or guarantors on said bond pay said Two Hundred Thousand ($200,000.00) Dollars, or any part thereof, and any assets are turned back to the shareholders of party of the second part for final liquidation, they shall have the right to participate in the liquidation of these assets to the amount that they have paid on the surety bond before payment shall be made to the individual shareholders of the party of the second part. It is the intent of this agreement that the shareholders of the party of the second part shall have no rights in the assets until the party of the first part has been fully protected from and indemnified against all claims

of any character whatsoever on the liabilities assumed.

It is expressly understood between the parties hereto that the party of the first part does not assume the liabilities of the party of the second part except those as shown by the daily statement of the bank.

The Atlas Exchange National Bank agrees to do every act necessary to carry out the intent of this agreement and also to place the Atlas Exchange National Bank in voluntary liquidation at a later date in order to dispose of its charter.

IN WITNESS WHEREOF the said parties of the first and second part have caused these presents to be signed by their respective presidents and attested by their respective cashiers, or secretaries and their respective seals to be hereto affixed this 20th day of June, A. D. 1930.

WEST SIDE NATIONAL BANK OF CHICAGO
By THOMAS J. HEALY,
President.

148 Attest:
A. B. WALTERSHAUSEN,
Secretary.

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO
By DANIEL M. HEALY,
President.

Attest:
B. M. BLANKENHEIM,
Cashier.

149 Plaintiff rests.

153 The following instructions and motions were offered at the close of all the evidence.

154 Motion made by plaintiff in writing to give the jury the following instruction in writing:

155 The court instructs the jury to sign and return into court in the above entitled cause, a verdict in the following words and figures:

'We the jury, find the issues for the plaintiff and assess the plaintiff's damages in the sum of $4,319.47.'

Motion denied.

Instruction marked "refused".

158 Motion by defendant in writing to give the jury the following instruction in writing:

159 The jury are instructed to find the issues for the defendant.

160 Motion denied.

Exception by defendant.

Instruction marked "refused".

Exception by defendant.

162 The court thereupon at the request of the plaintiff gave to the jury on behalf of the plaintiff the following instructions, to the giving of each and all of which instructions the defendant duly excepted:

1.

163 The jury are instructed that you the jury are the sole judges of all the questions of fact in this case, and you should determine these questions from the evidence in this case. The law of the case, as contained in the instructions given by the court to the jury should

be applied by the jury to the facts of the case as you find such facts to be from the evidence. The jury should not be influenced in the slighest degree as to the facts in the case, by any assertion or statement of counsel, on either side of the case, unless the same is sustained by the evidence in the case.

2.

164 The court instructs you that if you find from the evidence that any witness or witnesses has or have wilfully and knowingly testified falsely as to any matters or things material to the issues in this case then you are at liberty to disregard the whole of the testimony of such witness or witnesses except insofar as the testimony of such witness or witnesses have been corroborated by other credible evidence or by facts and circumstances proven on the trial.

3.

165 You are instructed that the credibility of the several witnesses testifying in this case is exclusively a question for the jury to determine, as is also the weight to be attached to the testimony of each of them. In determining the credibility of the several witnesses as to any disputed issue in this case, you have a right to take into consideration, the opportunity of the different witnesses for knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements in view of all the evidence, facts and circumstances proven on the trial, and from all the evidence, facts and circumstances in

evidence, determine on which side is the weight or preponderance of the evidence.

4.

166 The jury are instructed that if you believe from the evidence that the plaintiff, Rose Kimen, purchased from Atlas Exchange National Bank of Chicago, a corporation, securities aggregating $4,000 known and described as gold bonds maturing July 15, 1930, and that she purchased said securities relying upon the promise and agreement of the defendant that it would repurchase said securities at maturity at par plus accrued interest thereon, and that plaintiff paid for said securities the sum of $4,004.47, and did thereafter on July 15, 1930, offer or tender back said securities to the bank demanding the payment thereof, that the defendant should be liable to the plaintiff for the amount paid by her plus accrued interest thereon upon the tender of the securities purchased by her, and if you believe from the evidence that plaintiff tendered such bonds to the defendant and that the defendant refused to accept such tender and pay back the consideration therefor, that in such event the defendant would be liable to the plaintiff for the full amount paid by her plus accrued interest thereon from the date of such agreement.

167 The plaintiff also asked the court to give to the jury the following instructions:

5.

168 The jury are instructed that if it finds from the preponderance of the evidence in this case, under the instructions of the court, that the plaintiff, Rose

Kimen, purchased from the defendant, the Atlas Exchange National Bank of Chicago, the certain securities referred to in plaintiff's declaration on file in this case and generally described as certain "gold bonds" which by their terms matured July 15, 1930, and aggregating in amount $4,000, and that before the plaintiff purchased said securities from said defendant and as a condition precedent to the purchase thereof, the plaintiff and defendant entered into an agreement which amongst other things provided in substance that if the plaintiff would purchase said "gold bonds" from the defendant at the time she did purchase them, at the consideration of their par or face value, plus accrued interest, that it, the defendant, would, if requested by the plaintiff, repurchase said securities from her at their maturity at their par or face value, plus the then accrued interest thereon, and further find that plaintiff relying upon said agreement purchased said securities and then and there paid to the defendant for said securities and as part of said agreement the sum of $4,004.47 and further find that thereafter on or about to-wit: July 15, 1930, the maturity date of said "gold bonds," plaintiff tendered said "gold bonds" to the defendant pursuant to said agreement aforesaid, if you find said agreement was entered into, and requested the defendant to repurchase said bonds then you are instructed
169 that notwithstanding the defense interposed by the defendant on this trial that the making of the agreement claimed by the plaintiff to have been made at the time she purchased said securities, with said defendant, for the repurchase thereof, was an *ultra vires* act, meaning an agreement that it was prohibited by law from entering into, that

this constitutes no defense to an agreement such as the plaintiff alleges was made at the time she purchased the bonds, because the defendant could not take the plaintiff's money under an *ultra vires* or invalid act on its part and keep it, if the act by which it received the money was *ultra vires* or invalid on its part, then it must return the money received under such an invalid act. Therefore, if you find from the preponderance of the evidence, that it did receive the money from the plaintiff under an agreement in manner and form as above stated, it will be your duty to find the issues for the plaintiff and assess her damages at the amount of money it received from the plaintiff, namely $4,004.47 plus interest at the rate of 5 per cent per annum from the date it was received allowing credit to the defendant for such interest as the plaintiff collected on said securities, namely, $....., or a verdict in the sum of $.....

170 But the court refused such instruction and marked the same "refused." Thereupon the court, at the request of the defendant, gave to the jury on behalf of the defendant, the following instructions:

1.

171 If the jury believe from the evidence in this case that the bonds involved were sold to the plaintiff by the defendant at a price of 98 per cent of their par value, and if you further believe from the evidence that there was paid by the plaintiff to the defendant an additional one-half of one per cent of the par

value of said bonds as the consideration for the execution by the bank of the repurchase agreement offered in evidence, then you are instructed that the plaintiff is only entitled to recover in this case the said one-half of one per cent of the par value of said bonds or twenty dollars, with interest thereon at five per cent from November 2, 1929, and that there can be no other or further recovery by the plaintiff.

2.

172 The court instructs the jury that prior to and on the 2nd day of November, 1929, there was a certain act of Congress in full force and effect which provided among other things that banks organized under the national banking laws of the United States of America should in the business of buying and selling investment securities be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, co-partnership, association or corporation in the form of bonds, notes, or debentures commonly known as investment securities.

3.

173 It is your duty to try this case and consider the defendant in all matters pertaining to this case as though it were a living person instead of a case in which the defendant is a corporation, and the fact that the plaintiff is an individual and the defendant is a corporation should make no difference with you, nor should any sentiment of prejudice or feeling of sympathy have any weight with you in deciding this case. It is your duty to try this case and consider the evidence with the same fairness and impartiality and

arrive at the same verdict as you would if the contest were between two men.

4.

174 You are further instructed that while the law permits a plaintiff in a case to testify in her own behalf, nevertheless, you have a right, in weighing her evidence and determining how much credence is to be given it, to take into consideration the fact that she is the plaintiff and that she is interested in the result of the suit.

5.

175 The jury are instructed that the plaintiff is required by law to establish her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so established her case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases the jury should find the issues for the defendant.

176 The court instructs the jury that in determining which side has the greater weight of evidence, you are to take into consideration that each side is entitled to the benefit of the testimony of each and every witness, without regard to which side may have called the witness, and you are required by the law to allow the defendant the benefit of any and all admissions by witnesses called for the plaintiff, which you may believe, under the evidence and instructions of the court, have weight or bearing in defendant's favor.

177 And the defendant, by its counsel, also asked the court to give to the jury the following instruction:

178 The court instructs the jury that the defendant Atlas Exchange National Bank had no power or authority to enter into the contract offered in evidence by the plaintiff dated November 2, 1929, wherein the said bank agreed to repurchase at par the First National Company collateral Series "O" First Mortgage Real Estate 5½% Gold Bonds involved in this suit, but that said contract is invalid and void and there can be no recovery thereon.

But the court refused to give such instruction to the jury, to which action of the court the defendant then and there duly excepted.

179 The verdict of the jury favored the plaintiff, finding the defendant guilty, and assessing the plaintiff's damages at the sum of $4,004.47, plus accrued interest.

Motion by defendant for a new trial overruled. Exception by defendant. Motion by defendant in arrest of judgment overruled. Exception by defendant.

180 Thereupon the court on the 27th day of January, A. D. 1932, entered judgment upon the verdict, to the entry of which judgment the defendant then and there duly excepted.

The defendant prays an appeal to the Appellate Court of Illinois, First District, which is allowed upon the filing of bond for $5,000 in sixty days and bill of exceptions in ninety days.

Whereupon on the 30th day of January, A. D. 1932, plaintiff moves court to vacate judgment entered January 27, 1932, the court thereupon vacated and set aside the said judgment. Whereupon plaintiff remitted the sum of $110 from the amount of said verdict, and the court thereupon on the 30th day of January, 1932, entered judgment for the plaintiff in the sum of $4,330.47, to which action of the court the defendant by its counsel then and there duly excepted.

Defendant prays an appeal to the Appellate Court of Illinois, First District, which was allowed upon filing of bond in the sum of $5,000 in sixty days and bill of exceptions in ninety days.

181 Certificate to bill of exceptions signed by Thomas J. Lynch, Judge of the Circuit Court, dated the 6th day of April, A. D. 1932, marked "presented the 6th day of April, A. D. 1932. I approve the above bill of exceptions.

SHULMAN, SHULMAN & ABRAMS,
Attorney for Plaintiff."

182 Stipulation to incorporate in transcript of record original bill of exceptions.

184 Order approving bill of exceptions.

185 Writ of error from Appellant Court of Illinois to the Circuit Court of Cook County filed December 30, 1933.

187 Certificate of clerk to transcript of record.

188 ASSIGNMENT OF ERRORS.

And now comes the Atlas Exchange National Bank of Chicago, the plaintiff in error, by Elbridge W. Rice, its attorney, and says that in the record and proceedings and in rendering the judgment aforesaid there is manifest error, in this, to-wit:

1st. The trial court erred in admitting improper evidence on behalf of the plaintiff.

2nd. The trial court erred in refusing to admit proper evidence on behalf of the defendant.

3rd. The trial court erred in giving improper instructions on behalf of the plaintiff.

4th. The trial court erred in refusing proper instructions on behalf of the defendant.

5th. The trial court erred in overruling defendants motion for a new trial.

6th. The trial court erred in overruling the defendant's motion in arrest of judgment.

7th. The trial court erred in overruling the defendant's motion to direct a verdict for the defendant at the close of plaintiff's case; and in refusing to instruct the jury to find the issues for the defendant.

8th. The trial court erred in overruling the defendant's motion to direct a verdict for the defendant at the close of all the evidence in the case; and in refusing to instruct the jury to find the issues for the defendant.

9th. The verdict is against the evidence.

10th. The verdict is against the weight of the evidence.

11th. The verdict is in contravention of the law.

12th. The verdict is against the law and the evidence.

13th. The judgment is not legally supported by the evidence.

By reason whereof the plaintiff in error prays that said judgment may be reversed.

ELBRIDGE W. RICE,

Attorney for Atlas Exchange National Bank of Chicago, a corporation, Plaintiff in Error.

47 At A Term Of The Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four within and for the First District of the State of Illinois.

Present:

Hon. John J. Sullivan, Presiding Justice.
Hon. Martin M. Gridley, Justice.
Hon. Wickham Scanlan, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

	ROSE KIMEN, *Defendant in error,*	Appeal from Error to Cook Circuit.
37308	*vs.*	
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in error.*	

Be It Remembered, That heretofore on the 5th day of December A. D. 1933, it being one of the days of said December Term, A. D. 1933, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

48 At a Term of the Appellate Court, Begun and held at Chicago, on Tuesday, the Fifth day of December in the year of our Lord One Thousand Nine Hundred and Thirty-three within and for the First District of the State of Illinois.

Present:

Hon. David F. Matchett, Presiding Justice.
Hon. William H. McSurely, Justice.
Hon. John M. O'Connor, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Court met pursuant to law. Court opened by proclamation.

And afterwards, on the 28th day of December A. D. 1933, there was filed in the office of the Clerk of said Court the Peoples Praecipe for a Writ of Error and Writ of Scire Facias which said Praecipe is in words and figures following, to-wit:

49 PRAECIPE.

State of Illinois, }
Appellate Court, } ss.
First District }

To The February Term, A. D. 1934.

49

ROSE KIMEN, (*Plaintiff,*) *Defendant in Error,* Gen. No. 37308 *vs.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, (*Defendant.*) *Plaintiff in Error.*	Error to the Circuit Court of Cook County. *Nisi Prius* Gen. No. B-204984 *Nisi Prius* Judge Thomas J. Lynch

The Clerk will please issue a writ of Error in the above entilted cause, directed to the Clerk of the Circuit Court of Cook County. Also issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of trespass on the case upon promises in the Circuit Court of Cook County, Illi-

nois, wherein judgment was rendered on the 30th day of January A. D. 1932 and at the January 1932 Term of said Circuit Court, on the law side thereof in favor of Rose Kimen and against Atlas Exchange National Bank of Chicago, a Corporation for Four Thousand Three Hundred Thirty & 47/100 ($4330.47) Dollars besides costs of suit.

ELBRIDGE W. RICE,
Attorney for Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in Error.

To Sheldon W. Govier,
Clerk of the Appellate Court,
First District, Illinois.

50 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Writ of Error in said cause directed to the Clerk of the Circuit Court of Cook County, which said Writ of Error is in the words and figures following, to-wit:

51 State of Illinois, }
Appellate Court, } ss.
First District. }

THE PEOPLE OF THE STATE OF ILLINOIS.

To the Clerk of the Circuit Court for the County of Cook, Greeting:

Because, In the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between Rose Kimen, plaintiff, and Atlas Ex-

change National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid Atlas Exchange National Bank of Chicago, a Corporation, defendant, as we are informed by its complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first Tuesday of February next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, The Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

(SEAL) SHELDON W. GOVIER,
Clerk of the Appellate Court of the First District.

52 And afterwards on the same day to-wit: the 28th day of December A. D. 1933, there issued out of the office of the Clerk of said Court and under the seal of said Court the Peoples Scire Facias in said cause directed to the Sheriff of Cook County to execute which said Scire Facias with the return of the Sher-

iff thereon endorsed is in the words and figures following, to-wit:

53 State of Illinois, }
Appellate Court, } ss.
First District }

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Rose Kimen, plaintiff, and Atlas Exchange National Bank of Chicago, a Corporation, defendant, it is said manifest Error hath intervened, to the injury of the said Atlas Exchange National Bank of Chicago, a Corporation, defendant, as we are informed by its complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court, of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, We Command You, That by good and lawful men of your county, you give notice to the said Rose Kimen that she be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February, A. D. 1934, to hear the record and proceedings aforesaid, and the errors assigned if she shall see fit, and further to do and receive what said Court shall order in this behalf; and have you then and there the names of those by whom you shall give the said notice, together with this writ.

Witness, Hon. David F. Matchett, Presiding Justice of our Court and the seal thereof, at Chicago, this 28th day of December in the year of our Lord one thousand nine hundred and Thirty-three.

(SEAL) SHELDON W. GOVIER,
Clerk of the Appellate Court of the First District, Illinois.

State of Illinois } ss.
Cook County }

Served this writ on the within named defendant Rose Kimen by reading the same to her and at the same time delivering a copy thereof to her this 6th day of January, 1934.

WILLIAM D. MEYERING, *Sheriff.*
By EDWARD J. MORAN, *Deputy.*

54 And afterwards on the 19th day of January A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

55 In the Matter of the Assignment of Cases to the Third Division Appellate Court, First District, Illinois. } February Term, A. D. 1934. Calendar

On the Court's own motion it is ordered that the following numbered cases on the February Term Calendar, A. D. 1934 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit:

37308: *Rose Kimen* v. *Atlas Exchange National Bank of Chicago.*

And afterwards, on the 16th day of February, A. D. 1934, it being one of the days of the February Term, A. D. 1934 the Appearance of the Defendant in Error was filed in the words and figures following, to-wit:

56 APPEARANCE

State of Illinois, Appellate Court, First District. } ss.

February Term, A. D. 1934.

ROSE KIMEN, *Defendant in error,*
Gen. No. 37308
vs.
ATLAS EXCHANGE NATIONAL BANK.

Appeal From .....
Error to Circuit Court of Cook County

I hereby enter the appearance of Rose Kimen and my appearance as attorney for said defendant in error in the above entitled cause.

LLOYD C. WHITMAN,
Attorney for defendant in error.

And afterwards on the same day to-wit: the 16th day of February, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

57 ROSE KIMEN, *Defendant in error,*
37308 vs.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in error.*

Error to Cook Circuit.

This day came Defendant in error by her counsel and moved the Court to extend the time to and includ-

ing March 19th, A. D. 1934 in which to file her briefs in said cause as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards on the 23rd day of February A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

58

ROSE KIMEN,
Defendant in Error,

37308 *vs.*

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

} Error to Cook Circuit.

At the request of the Judges of the Third Division, Appellate Court, it is ordered that the order heretofore entered herein in said cause on January 19th, A. D. 1934 assigning said cause to the Third Division, Appellate Court be and the same is hereby vacated and set aside, and said cause is hereby assigned to the Second Division, Appellate Court for hearing and determination.

And afterwards on the 6th day of March A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

59

ROSE KIMEN,
Defendant in Error,

37308 *vs.*

ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

Appeal from .....

} Error to Cook Circuit.

This cause having this day been reached in the call of the docket, and counsel not desiring to argue the

same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and brief of Defendant in error due March 19, 1934.

And afterwards, on the 7th day of March, A. D. 1934 the following proceedings were had and entered of record in said cause, to-wit:

	LEO AWOTIN, *Defendant in Error.*	
37307	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

	ROSE KIMEN, *Defendant in Error.*	
37308	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

This day came Defendant in error by his Counsel and moved the Court to consolidate cause General Number 37308 for hearing in this Court with cause General Number 37307 in this Court and that the briefs filed and to be filed in cause General Number 37307 stand and be taken and considered as the briefs filed in cause General Number 37308 as per suggestions, affidavit and consent filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 3rd day of April A. D. 1934, it being one of the days of the April Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

61 ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
} Error to Cook Circuit.

This day came Plaintiff in error by its Counsel and moved the Court to advance the above entitled cause for an early decision in this Court as per petition filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 10th day of April A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

62 LEO AWOTIN,
Defendant in Error,
37307 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
} Error to Cook Circuit.

ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
} Error to Cook Circuit.

This day came Defendants in error by their Counsel and moved the Court that the above entitled cause be

placed on the Oral Argument Calendar of this Court as per suggestions filed herein. And the Court being fully advised in the premises doth grant said motion. It is therefore ordered by the Court that said causes be and the same are hereby placed upon the Oral Argument Calendar of this Court.

And afterwards on the 1st day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

63

Leo Awotin, *Defendant in Error.* 37307 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error*	}	Error to Cook Circuit.
Rose Kimen, *Defendant in Error* 37308 *vs.* Atlas Exchange National Bank of Chicago, a Corporation, *Plaintiff in Error.*	}	Error to Cook Circuit.

On motion of Defendant in error this day made in open Court for leave to file a Supplemental Brief in said cause instanter and that Plaintiff in error be granted leave to file an additional Reply Brief within 10 days. It is ordered by the Court that said motion be and the same is hereby allowed.

And afterwards on the 15th day of May A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

64 Leo Awotin,
Defendant in Error.

37307 *vs.*

Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.

} Error to Cook Circuit.

Rose Kimen,
Defendant in Error,

37308 *vs.*

Atlas Exchange National Bank of Chicago a Corporation,
Plaintiff in Error.

} Error to Cook Circuit.

This day came Defendants in error by their Counsel and moved the Court that the suggestions hereto attached stand and be taken as an additional brief of Defendants in error herein or that the Defendants in error be granted leave to file an additional brief in said cause within 3 days as per suggestions and affidavit filed herein. And the Court being fully advised in the premises doth order that the additional suggestions hereto attached stand and be taken as an additional brief of the Defendants in error herein.

And afterwards on the same day to-wit: the 15th day of May A. D 1934, the following proceedings were had and entered of record in said cause, to-wit:

65 Leo Awotin,
Defendant in Error
37307 *vs.*
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.
} Error to Cook Circuit.

Rose Kimen,
Defendant in Error.
37308 *vs.*
Atlas Exchange National Bank of Chicago, a Corporation,
Plaintiff in Error.
} Error to Cook Circuit.

This day came Plaintiff in error by its counsel and moved the Court for leave to file the additional suggestions hereto attached as an answer to the suggestions of the Defendant in error as per suggestions filed herein. And the Court being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

66

ROSE KIMEN,
Defendant in Error,
No. 37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.

Error, to Cook Circuit. Appeal, from .....

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned, for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment of January 30th, A. D. 1932 aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error, and others in the record and procedings aforesaid, Judgment of January 30th, A. D. 1932 of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed. And it is further considered by the Court that the said Plaintiff in error recover of and from the said Defendant in error its costs, by it in this behalf expended in this Court and in the Circuit Court of Cook County to be taxed, and that it have execution therefor.

67 And afterwards on the 26th day of June A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

68

	LEO AWOTIN, *Defendant in Error.*	
37307	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

	ROSE KIMEN, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

The Court having considered the motion of Defendants in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause as per petition and affidavit filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied.

And afterwards on the 3rd day of July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

69 LEO AWOTIN,
Defendant in Error,
37307 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

ROSE KIMEN,
Defendant in Error,
37308 *vs.*
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION,
Plaintiff in Error.
Error to Cook Circuit.

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for leave to Appeal shall have expired, or if such petition shall have been filed within the proper time, then until said petition shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion, and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the same day to-wit: the 3rd day July A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

70

	LEO AWOTIN, *Defendant in Error,*	
37307	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

	ROSE KIMEN, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

The Court having considered the motion of Defendants in error that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired, without any such petition having been filed, and if such petition for said Writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused, and the Court being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards on the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

	ROSE KIMEN, *Defendant in Error,*	
37308	*vs.*	Error to Cook Circuit.
	ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	

On this day in vacation after the June Term A. D. 1934 came Defendant in error by her Counsel and moved the Honorable John J. Sullivan, one of the Justices of said Court, to substitute Samuel A. and Leonard B. Ettelson as Attorneys for Defendant in error herein in said cause, in lieu of Lloyd C. Whitman as per withdrawal and substitution filed herein. And the undersigned being fully advised in the premises doth order that said motion be and the same is hereby allowed.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And afterwards on the same day to-wit the 16th day of August A. D. 1934, it being one of the days in vacation after the June Term A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

72	ROSE KIMEN *Defendant in Error,* *vs.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*	Error to Circuit Court
37308		

On this day in vacation after the June Term A. D. 1934 came Rose Kimen, Defendant in error in said cause and Plaintiff in the Circuit Court of Cook County, and moved the Honorable John J. Sullivan, one of the Justices of said Court, for the issuance of the Certificate of this Court that there is fairly involved in the claim of the said Rose Kimen, Defendant in error aforesaid more than Fifteen Hundred Dollars ($1500.00) as per affidavit filed herein. And the undersigned being fully advised in the premises is of the opinion and Therefore Certify that more than Fifteen Hundred Dollars ($1500.00) is fairly involved in the claim of the said Rose Kimen, Defendant in error herein and Plaintiff in the Circuit Court of Cook County.

JOHN J. SULLIVAN,
Justice of the Second Division, Appellate Court, First District, Illinois.

And heretofore, on the 15th day of June A. D. 1934, it being one of the days of the June Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

73

ROSE KIMEN *Defendant in Error,*		
37308 *vs.*		Error to Cook County.
ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, A CORPORATION, *Plaintiff in Error.*		Cook Circuit.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out on December 28, 1933, to the February term, 1934, of this court. On March 7, 1934, on motion of defendant in error, the case was ordered to be consolidated for hearing with case No. 37307, *Awotin* v. *Atlas Exchange National Bank,* and subsequently the two cases were advanced for hearing and were heard on oral argument and printed briefs submitted. An opinion has this day been filed in the *Awotin* case.

The Atlas Exchange National Bank, defendant in the trial court, here seeks to reverse a judgment against it for $4,330.47, entered by the circuit court of Cook county in plaintiff's favor on January 30, 1932, following the verdict of a jury. The action, which is in *assumpsit,* was commenced on August 19, 1930. Plaintiff's declaration, filed September 5, 1930, consisted of the common counts and a special count. In the special count plaintiff alleged in substance:

"That on November 2, 1929, at Chicago, the Atlas Bank offered to sell to plaintiff "$4,000,

First National Company, Collateral Trust, Series 'O' First Mortgage Real Estate 5½% Gold Bonds," in denomination of $1,000 each, and then and there "promised that if plaintiff purchased said bonds and paid therefor the sum of $4,000, together with the accrued interest thereon, it (defendant) would repurchase from plaintiff the said bonds at maturity, paying therefor par value of
74 the bonds and accrued interest thereon;" that plaintiff, in consideration thereof, on November 2, 1929, paid to defendant the sum of $4,000 and purchased from it the bonds; that to evidence the agreement defendant reduced it to writing; and that "as an inducement to plaintiff to purchase said bonds," defendant then and there delivered to plaintiff the following writing:

"November 2, 1929.

Rose Kimen,
Chicago, Ill.

Dear Madam:

This is to acknowledge that we have this day sold you $4,000, par value, First National Company Collateral Trust, First Mortgage, Series 'O' Real Estate 5½% Gold Bonds, in denomination of $1,000 each, numbered 4595-4596-4599 and 4600.

Should you desire to recall these bonds to us, we hereby agree to repurchase same at maturity at par, or $4,000, and accrued interest.

Yours very truly,

(Signed) B. M. BLANKENHEIM,
Cashier."

That the bonds matured on July 15, 1930; that on that day plaintiff presented them to defendant and demanded that it repurchase them and pay to plaintiff the sum of $4,000 and the accrued interest; that defendant refused to repurchase the

bonds and, although plaintiff has made repeated demands subsequent to July 15, 1930, upon it to repurchase them "in accordance with said agreement," yet defendant has not paid said sum of $4,000 and accrued interest, or any part thereof, to plaintiff, and refuses so to do; to plaintiff's damage, etc.

Accompanying the declaration, and on the reverse side of the printed form of the common counts, is "plaintiff's affidavit of amount due," sworn to by Thomas C. Kennedy on September 4, 1930, in substance that plaintiff's demand is for the sum of $4,250, "due and owing from defendant to plaintiff under its *written agreement dated November 2, 1929;*" and that there is now due to plaintiff from defendant, after allowing to it all just credits, etc., the sum of $4,250.

To the declaration defendant filed a plea of the general issue, accompanied with an affidavit of merits by its president, and with a written demand for a jury trial. On October 15, 1931, defendant, by leave of court, filed an additional plea, accompanied with an amended affidavit of merits by its president. In the plea it is alleged:

75 That defendant is a national bank, organized under the National Banking Laws of the United States; that "neither its charter nor the said law gives to defendant any power or authority whatever to guarantee payment of the indebtedness of any other person, firm or corporation, or to repurchase bonds at maturity, but requires that defendant in buying and selling investment securities shall do so *without recourse;*" and that the "supposed guaranty or repurchase agreement of the said B. M. Blankenheim, Cashier, as set forth in plaintiff's declaration, is *ultra vires* and *void.*"

In the amended affidavit of merits, filed with the additional plea, it is stated:

> That there is not owing to plaintiff from defendant the sum of $4,250, or any other sum; that the supposed agreement set forth in the declaration "is not the agreement of defendant;" that defendant never authorized or empowered anyone to execute the same; that defendant is a corporation organized under the Banking Laws of the United States; that under the provisions of said laws defendant "had no power or authority to enter into said supposed agreement mentioned in plaintiff's declaration;" and that "such agreement is *ultra vires* and *void.*"

To the additional plea plaintiff filed a replication in which she alleged:

> "That if defendant by its laws was prohibited from buying and selling the securities set forth and described in plaintiff's declaration and was not authorized by the National banking laws of the United States to enter into the agreement with plaintiff to receive her money, then it ought to return the moneys thus wrongfully received by it from plaintiff, together with interest thereon at the legal rate,—plaintiff hereby offering and tendering to return the securities purchased on the alleged illegal agreement."

On October 26, 1931, by leave of court, plaintiff filed an additional count in which, after mentioning the execution and delivery by defendant of the repurchase agreement of November 2, 1929, etc., it is alleged that she then and there paid to defendant for said bonds the sum of $4,004.47, and received the bonds from it; that when they matured, viz., July 15, 1930, she presented them to defendant and "demanded that it repurchase said bonds, but that defendant refused and

still refuses so to do;" that defendant "now claims that said agreement was prohibited by the National Banking Act and that it had no right to execute the same;" that by reason thereof "plaintiff tenders said bonds in open court and demands the return of the consideration paid, plus accrued interest thereon from
76 the date of said sale;" and that it is defendant's duty to repay the same to her, but that after repeated demands defendant still refuses so to do; to plaintiff's damage, etc. Accompanying the additional count is plaintiff's affidavit in which she states "that the nature of her claim is for moneys had and received by defendant from plaintiff, as is more fully set out in said additional count;" and that there is due to her from defendant, after allowing all its just deductions, etc., the sum of $4,004.47, plus interest, etc. To the additional count defendant filed a general demurrer, but on November 5, 1931, the court overruled it.

On November 14, 1931, to the additional count, defendant filed a plea of the general issue and two other pleas. In the second plea it alleged that neither its charter nor the National Banking Law give to it any power or authority in selling investment securities to enter into an agreement to repurchase the same at a subsequent date, but require that such securities be sold "without recourse," and that the supposed repurchase agreement mentioned is "*ultra vires* and void." In the third plea there are similar allegations and the additional allegation that "the only benefit" received by defendant for the execution of said agreement "was the payment to it of one-half per cent of the face value of the bonds mentioned in said agreement; or twenty ($20) dollars." Accompanying the pleas is an affidavit of merits, stating *inter alia* that under the

provisions of the banking laws of the United States defendant "had no power or authority to enter into the agreement mentioned in plaintiff's declaration; that such agreement is *ultra vires* and void; and that the only benefit received by defendant on account of said contract was the sum of twenty ($20) dollars, paid as the consideration for the execution of the same."

In plaintiff's replication to the third plea she alleged
77 that "if defendant was by said National Banking Laws prohibited from entering into the agreement with plaintiff to receive her money, then it ought to return the money thus wrongfully received by it; that the benefits received by defendant from plaintiff were not the sum of $20, as alleged in said third plea to the additional count, but that it received the entire amount from plaintiff as set forth in said additional count; and that defendant ought, therefore, to return the entire consideration received by it; and plaintiff hereby offers and tenders to return the securities purchased on the allegel illegal agreement."

On the trial plaintiff testified in her own behalf and she called as a witness for her Dr. Leo Awotin, a physician and surgeon practicing in Chicago. She also introduced in evidence, in addition to certain other writings, the repurchase agreement and the four bonds referred to in the declaration. For defendant Daniel N. Healy, its president, testified, and he gave further testimony when called by plaintiff in rebuttal. Certain other writings were offered by defendant and received in evidence. At the conclusion of plaintiff's evidence in chief, and again at the close of all the evidence, defendant moved for a directed verdict in its favor, but the motions severally were denied. While

plaintiff was on the stand, her attorney, in her behalf, and with her consent, formally tendered the four bonds to defendant "if defendant will pay back the four thousand and odd dollars paid to it for them." A part of plaintiff's testimony is in substance as follows:

> My occupation is that of housekeeper for Dr. Awotin. I was at the offices of defendant bank in Chicago on November 1st and 2nd, 1929, and Dr. Awotin was with me. We had conversations with Mr. Blankenheim, cashier of the bank. He said that the bank had bonds for sale, First National Company bonds, and that they "are 100 per cent good, safe and short term bonds," I told him "I don't want to buy those bonds as I don't know anything about them, how good or how bad they are." Blankenheim then asked: "Would you buy the bonds from us if we agreed to repurchase them from you at maturity (July 15,
> 78 1930)?" And I "asked what were the terms?" He replied "If you buy these bonds from us now and pay 98 per one hundred down, we will promise and agree to repurchase them from you at par value." Then I said: "I want a contract; will you please write it down?" Whereupon Blankenheim said: "If you want us to write that in a contract, you will have to pay a half cent more for making the contract." I replied: "I will pay the half cent more for you to make the contract." And "I paid 98½ per hundred; and I accepted the contract; and I paid altogether for the bonds $4,004.47." After I had received the four bonds, Blankenheim said: "Now you will have nothing to worry about on these bonds; as soon as they are due you will get your cash." The four bonds now shown me are the same bonds I received at that time. Thereafter *I collected on the coupons* which became due on January 15, 1930. I didn't collect on the coupons which matured on July 15, 1930. I never

received any other money on the bonds. When the bonds matured, July 15, 1930, I, in company with Dr. Awotin, again saw Blankenheim at the bank. I offered him the four bonds, but he said: "I can't buy your bonds because you will have to see Mr. Healy, president of the bank." A week or so later, Dr. Awotin and I saw Mr. Healy at his office at 111 West Washington Street, Chicago; I offered the bonds to him; but he said that the bank "hadn't any money to purchase these bonds." And that "as soon as he got the money he would purchase them," and that the bank had become "merged" with another bank.

Dr. Awotin in his testimony corroborated plaintiff as to the purport of the conversations had with Blankenheim on November 1st and 2nd, 1929, and as to the execution and delivery to her by the bank of the repurchase agreement and the delivery of the four bonds to her. He further testified in part:

"After these bonds were delivered to Miss Kimen I was at the Atlas Bank with her several times. * * On July 15, 1930, I was present with her at the West Side National Bank. That is the bank that consolidated with the Atlas Bank. We there saw Blankenheim. Miss Kimen said: 'Here are the bonds and I want you to repurchase them.' He said: 'I can't repurchase them; you will have to see Mr. Healy first about the bonds; he has something to say to you.' About a week afterwards we saw Healy and had a conversation with him. Miss Kimen said: 'I have brought these bonds to you to repurchase; Blankenheim told me to see you about them.' Healy said: 'I have no money at the present time to repurchase them; the bank is merged; as soon as I get the money I will repurchase the bonds from you; * * I authorized the cashier to sell you these bonds and make with you a written contract; I am liable for

the bonds, but now there is no money on hand.' Healy said to me that the Atlas Bank merged with the West Side National Bank; that the bank's assets are tied up * * and that she would have to wait for a few months."

Defendant's witness, Healy, its president, testified in part substantially as follows:

That Blankenheim was not an officer of the Atlas Bank (defendant), or an employee of it or in any way connected with it, on July 15, 1933; that the Atlas Bank went out of business on June 21, 1930,
79 and was closed and is still closed; that its assets were turned over to the West Side National Bank upon the latter's assumption of its deposit liabilities; that it is not a fact that the Atlas Bank "merged" with the West Side Bank, nor did they "consolidate," that he (the witness) never held any office in the West Side Bank, or had anything to to with its business affairs; that up to June 21, 1930, Blankenheim was the cashier of the Atlas Bank and the active man in its affairs; that on that day he severed his official connection with it, and when its assets were turned over to the West Side Bank he was made an assistant cashier of the latter bank; that when the Atlas Bank was closed he (the witness) procured the resignations of all of its officers, and he has been and is now acting as the liquidator of the bank; that the "Comptroller did not close the bank;" that before the bank ceased doing business he (the witness) had no active management in the affairs of the bank; that he never knew until shortly after July 15, 1930, when Dr. Awotin and Miss Kimen saw Blankenheim and demanded payment of the amounts of certain bonds which they had purchased of the bank, that the bank had sold bonds with an agreement to repur-

chase them; and that Dr. Awotin and Miss Kimen are the only two having claims against the bank based upon such repurchase agreements.

That about a week after July 15, 1930, Dr. Awotin and Miss Kimen had a conversation with him at his office; that at that time he did not state that, as president of defendant bank or otherwise, he had authorized the execution of the repurchase agreement sued upon, or that he or the bank were liable upon the agreement to pay back the amount of the bonds; that on the contrary he stated to them that he "could not recognize the agreement because it was against the law;" that "Blankenheim never had any business signing it," that if he paid the money demanded he "would be violating the law and might become personally liable" and that if they wanted to make a trade with him for other bonds he would *personally* give them some of his own other bonds for the bonds in question; that subsequently negotiations were had between him (the witness) and Dr. Awotin concerning proposed trades of bonds, but finally Dr. Awotin sent word to him that he did not want to make any of the proposed trades; that at the time of the said conversation of July 15, 1930, he believed "that the bank was not liable on that agreement;" that he then personally owned some of the bonds of the same issues; that although those bonds were then in default he "still thought they were good;" and that he has since received money on those that he owns."

In view of the pleadings, the repurchase agreement sued upon and the evidence, including the testimony of plaintiff, we are of the opinion that the trial court erred in not granting defendant's motions to instruct the jury to return a verdict in its favor and in enter-

ing the judgment in question. The respective contentions of opposing counsel, here made, are substantially the same as some of the contentions made in the *Awotin* case, No. 37307, in which it appears that an action was brought upon a similar agreement and in which
80 case an opinion has this day been filed. For the reasons stated in that opinion, and particularly because of the decisions and holdings in the recently adjudicated cases of *Knass* v. *Madison and Kedzie State Bank*, 354 Ill. 554, and *Texas & Pacific Railway Co.* v. *Pottorff*, 54 U. S. Sup. Ct. Rep., No. 7, pp. 416-20 (discussed in our opinion in the *Awotin* case) it seems clear to us that the agreement herein sued upon is beyond the powers of defendant bank to make and is void upon the ground of public policy, and that, therefore, it cannot be enforced by any court and the present judgment should be reversed without a remandment of the cause. Accordingly, the judgment of the circuit court of Cook County, entered against defendant on January 30, 1932, is reversed.

REVERSED.

SULLIVAN, P. J., AND SCANLAN, J., CONCUR.

81 And afterwards on the 31st day of October, A. D. 1934, it being one of the days of the October Term A. D. 1934, there was filed in the office of the Clerk of said Appellate Court, a certified copy of an order of the Supreme Court of Illinois, denying the petition for Leave to Appeal in said cause, which same order is in the words and figures following, to-wit:

82 UNITED STATES OF AMERICA

State of Illinois. ss.

At A Supreme Court, Begun and held in Springfield, on Tuesday the Second day of October, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the State of Illinois.

Present:

Hon. Norman L. Jones, Chief Justice.
Hon. Clyde E. Stone, Justice.
Hon. Frederic R. DeYoung, Justice.
Hon. Warren H. Orr, Justice.
Hon. Lott R. Herrick, Justice.
Hon. Paul Farthing, Justice.
Hon. Elwyn R. Shaw, Justice.
Otto Kerner, Attorney General.
Warren C. Murray, Marshal.
Attest: Adam F. Bloch, Clerk.

Be It Remembered, that to-wit: on the 23rd day of October A. D. 1934, the same being one of the days of the said October term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following to-wit:

ROSE KIMEN, *Petitioner,* 22775 *vs.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO, *Respondent.*	October 23, A. D. 1934. Petition for leave to Appeal from First District. B.204984 - 37308

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as

well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and Keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Supreme Court in Springfield, in said State, this 30th day of October in the year of Our Lord one Thousand nine hundred and Thirty-four.

(Seal) ADAM F. BLOCH,
Clerk of the Supreme Court.

83 I, Sheldon H. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and Keeper of the records, files and seal thereof, Do Hereby Certify, that the foregoing pages numbered 1 to 46 inclusive are a true copy of the Abstract of Record filed by the Plaintiff in error in the case of *Rose Kimen, Defendant in error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in error* in said Appellate Court on January 17th, A. D. 1934.

I further certify that the foregoing pages 47 to 81 inclusive are a true, full and complete Transcript

of the Record of proceedings of said Appellate Court in the case of *Rose Kimen, Defendant in error* v. *Atlas Exchange National Bank of Chicago, a Corporation, Plaintiff in error,* of record in my office, and also of the opinion of said Appellate Court rendered herein and filed in said cause on the 15th day of June A. D. 1934, and also a certified copy of the order of the Supreme Court of Illinois denying the Petition for Leave to Appeal in said cause which was filed in said Appellate on the 31st day of October A. D. 1934, in said cause, as all of the same now appear on file in my office.

In Testimony Whereof, I have set my hand and affixed the seal of said Appellate Court, this 15th day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-four.

(Seal) SHELDON W. GOVIER,
Clerk of the Appellate Court,
First District, Illinois.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1935

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.